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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No.

FRANK K. WEINGARTNER, ROBERT L. HARPER, SUS SUYEYASU, NEAL HALL, ARMANDO J. ACEVEDO, et al, individually, and representing a class of unnamed plaintiffs,
Petitioners,

vs.

UNION OIL COMPANY OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioners above named and ten other plaintiffs below, being service-station dealers, petition for a writ of certiorari to review the judgment of the Ninth Circuit entered in this cause on August 3, 1970.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 1970 Trade Cases ¶73,291 (Appendix A herein). The Court of Appeals ruled that

petitioners' appeal from the order of the United States District Court for the Northern District of California filed July 31, 1968 was not a final order from which an appeal could be filed. The order of the District Court of July 30, 1968 (Cr. 887-888) is attached hereto as Appendix B herein. This order has not been reported. On July 8, 1966, the United States District Court for the Northern District of California had denied a motion of defendant to dismiss Count II of plaintiffs' complaint (class action count) (Cr. 358-360). A copy of the order of July 8, 1966, is attached hereto as Appendix C herein. It is unreported. A petition for a rehearing was not sought. An order enjoining respondent from ousting petitioner Frank K. Weingartner, lead plaintiff herein, is reported at 1966 Trade Cases ¶71,757 (N.D. Cal. 1966).

JURISDICTION

The judgment of the Court of Appeals was entered August 3, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does a determination by the Supreme Court of the United States that Union Oil Company of California had engaged in resale price control by coercive use of price fixing, consignment agreements enforced upon 1,978 (99%) of its lessee-dealers and 1,327 (63%) of its non lessee-dealers in *Simpson v. Union Oil Co. of California*, 377 U.S. 13 (1964); 396 U.S. 13 (1969) raise a class

action on behalf of these victims of the violative resale price maintenance scheme pursuant to the provisions of Section 4 of the Clayton Act, 15 U.S.C. §15 and Federal Rules of Civil Procedure, Rule 23, so that an order denying the class action on behalf of these dealers is appealable before final judgment as to the representatives of the class?

2. Is the respondent who established a resale price fixing program following the decision by the Supreme Court of the United States in *Simpson*, supra, on April 20, 1964, which allegedly allowed it to control the price judgments of thousands of dealers in substantially the same way as it did under the previous consignment device, subject to a class action on behalf of all alleged victims of the resale price fixing program?

3. Is an order which denies a class action prior to trial on behalf of a large class of service-station dealers who are victims of price fixing programs of respondent appealable since by reason of a denial of the class action justice is thereby delayed as to all members of the class and it is known to the court by the laws of nature and chance that the dealer victims will die, will face bankruptcy or leave no trace pending the time the order establishing the class could have been made on review and the time an order might be made on appeal from the final judgment after trial?

4. Assuming an appealable order, has the learned court below erred in not ordering a class action as to: (1) the victims of Union Oil's Retail Dealer Consignment Agreement Program which has been the subject of two rulings by this Court; (2) the victims of *Union's* Storage

and Purchase Agreement Program commencing about September, 1964, alleged to be resale price fixing program using virtually the same devices as were used by Union during the period it used the consignment device?

STATUTES INVOLVED

The statutes involved are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2, and Section 4 of the Clayton Act, 15 U.S.C. §15. Federal Rules of Civil Procedure, Rule 23 is also involved. These are printed and attached to this petition as Appendix D herein.

STATEMENT OF THE CASE

A. The Complaint.

1. The contentions of plaintiffs.

The original complaint against Union Oil Company of California (hereinafter referred to as Union) for violation of the antitrust laws in the promulgation and enforcement of its Retail Dealer Consignment Agreement Program was filed by five Union Oil service station dealer-lessees, as listed in the above entitled caption, on April 20, 1965, (Cr. 1; and see Amended Complaint filed April 20, 1966, Cr. 336-346 (Appendix E herein). These plaintiffs sought damages covering the period April 20, 1961 until about September, 1964 arising from the control of their resale prices by means of a consignment agreement by which defendant fixed retail prices as a matter of contract (Cr. 6). From Sep-

tember, 1964 to the filing of the complaint, it was alleged that Union continued to control the plaintiffs' retail prices under a Retail Dealer Storage and Purchase Agreement (Cr. 6). It was alleged that under this agreement, the wholesale price to the dealer varies according to the fluctuations in retail price established by Union. The complaint alleged, "the wholesale price is manipulated by defendant so as to control the dealer's retail prices. The retail dealer's margins are based on the consignment scale in effect under the Retail Dealer Consignment Agreement" (*Id.*).

Damages under both programs were based on the means used by defendant in controlling retail prices. The defendant established a sliding scale by which the dealers absorbed three-tenths of one cent for every one cent drop in retail price ordered by Union. The plaintiffs estimated this loss of commission or margin as contrasted to base commission and applied it to their gallonage figures. They arrived at the following amounts of damages (Cr. 8):

A. Acevedo	$1,000.00	(consignment period only)
N. Hall	$3,000.00	
R. L. Harper	$7,000.00	
S. Suyeyasu	$4,000.00	(consignment period only)
F. K. Weingartner	$7,000.00	

2. The Class Action.

Plaintiffs also claimed to represent, under the provisions of Rule 23 of the Federal Rules of Civil Procedure, all service station dealers under consignment agreement with defendant from four years preceding the filing of the complaint (Cr. 8-10).

Defendant did not immediately answer the complaint, but, instead, filed a motion to dismiss, to strike, to require a separate statement, to sever and for a more definite statement on August 2, 1965 (Cr. 12). Defendant urged that the second count should be dismissed; that there is no proper class, that the plaintiffs will not fairly insure adequate representation of all the alleged class, that the interests of the alleged members of the class are diverse and antagonistic, that the rights sought to be enforced are several and that there is no common question of law or fact affecting the several rights and no common relief is sought (Cr. 12-15).

B. Defendant's unauthorized solicitation of the class

Union Oil Company determined to support this opposition to the class action by instructing its Division Managers to have Union Oil Company personnel appear at each Union Oil Company service station to have the dealer sign a declaration that he wanted no part of the *Weingartner* action. The dealers were to be told and were told that the *Weingartner* action involved a claim for damages that the dealers would and could have sold gasoline at higher prices than Union permitted them to do. (Response of Defendant Union Oil Company of California to Plaintiffs' Interrogatories, Cr. 57-83).

The defendant then filed the declarations so obtained, 1229 in number, from dealers in the States of California, Arizona, Washington, Oregon, Nevada, Utah, Idaho and Montana, in support of a motion to dismiss Count II of the Complaint (Cr. 12-15). A sample form appears at Cr. 76. The forms were supplied by Union Oil Company to the division managers in Sacramento, San Francisco

and Los Angeles, California; Portland, Oregon; Seattle, Washington; Great Falls, Montana; Butte, Montana; and Phoenix, Arizona (Cr. 77-83, 66, 68).

C. Motion to dismiss the class action by defendant was denied in July, 1966

Following the receipt of the above mentioned answers to interrogatories, plaintiffs filed a motion to strike the declarations on the ground they were not affidavits as required by the Federal Rules of Civil Procedure, and on the ground that they were obtained as a result of duress (Cr. 256). The motion was supported in part by affidavits of Robert A. Brundage and Elso Taurian which set forth that they were told that all dealers in an area had signed the declarations when in fact that was not the case (Cr. 256-263).

Between the period August, 1965 to June, 1966, other Union Oil dealers requested the right to intervene in the *Weingartner* action. The first such motion was filed by Ray M. Miller, a dealer whose service station had been located in Norwalk in Southern California (Cr. 40-44). Mr. Loren G. McNeil and Mr. John T. Boyle filed motions to intervene in November, 1965 (Cr. 45, 52). On March 1, 1966, forty-two other dealers whose service stations were located in the southern part of California filed a motion to intervene (Cr. 129-200) alleging in part that their prices had been fixed by Union by coercive statements and threats during the period April, 1961 to April, 1965 (Cr. 129-200).

Following the filing of the defendant's memorandum in opposition to motions to intervene and motions to become parties, other Northern California dealers, Mr. Cooper,

Mr. Goff, Mr. Marsili and Mr. Matsell, filed motions to intervene or to become parties (Cr. 296, 299, 351). Mr. Herbert Lynn Kelly, who had leased a service station in Tucson, Arizona, also appeared and sought to become a party (Cr. 349).

Upon various motions of plaintiffs to intervene, etc., and Union Oil Company's motions to dismiss, strike, etc., the District Court, per Alfonso J. Zirpoli, ruled as follows (Appendix C, Cr. 358): the motions to intervene filed by the Southern California dealers were denied; the motion to strike the declarations of service station dealers filed by defendant were denied; the motions of Mr. Kelly and Mr. Miller to become parties filed June 21, 1966 and November 16, 1966 (sic), were denied; the motions of Messrs. McNeil, Boyle, Goff, Cooper, Matsell and Marsili were granted; all other motions to intervene as to dealers located in the Northern District of California were ordered to be filed within sixty days from June 24, 1966; the motion of plaintiffs to compel further answers to interrogatories was denied, with an exception; and the motion of defendant to sever the complaints of each plaintiff was denied. With respect to the class action, the Court stated as follows:

> "6. The proceedings have not yet reached a point where it is practicable for the Court to determine whether this action is to be maintained as a class action. Accordingly, defendant's motion to strike Count II of plaintiffs' complaint is DENIED without prejudice, the Court reserving until a later date the question whether this action may be so maintained."

Following the order of July 8, 1966, the interveners whose service stations had been located in the Southern

California area [illegible]ctions in the United States District Court for the Cent[illegible]istrict of California. These cases are *John J. Peter, et al. v. Union Oil Company of California* (C.D. Cal 1966) No. 66-1166; *Edward A. Aljian, et al. v. Union Oil Company* (C.D. Cal. 1966) No. 66-1226; *Herbert Lynn Kelly v. Union Oil Company* (C.D. Cal. 1966) No. 66-1625; *Vernon Anondson, et al. v. Union Oil Company* (C.D. Cal. 1967) No. 67-1718 (Cr. 733-785), and *Ray Miller v. Union Oil Company* (C.D. Cal. 1966) No. 67-767. Additional complaints were also filed in the *Weingartner* case by dealers located in the Northern Judicial District of California; L. G. McNeil, John T. Boyle, Fred Cooper, Ben Goff, Robert Marsili, Charles Matsell (Cr. 364-375); Elso Taurian, James Higgins (Cr. 391-401); Jack Anderson and David Cernolo (Cr. 444-453).

D. Answer of Defendant and Issues Thereby Framed

Thereafter defendant filed its Answers to the Complaints of the plaintiffs Cr. 414, 421, 437, 454). These Answers raised the following issues in the action:

(1) Did defendant utilize throughout Pacific States area of the United States retail price fixing consignment agreements pursuant to which it controlled resale prices and commissions or margins of independent service station dealers in violation of the antitrust laws affecting plaintiffs and thousands of similarly situated dealers in the same manner during the period 1955 until at least April, 1964?

(2) Did the decision in *Simpson v. Union Oil Co. of Calif.*, 377 U.S. 13 (1964) allow a defense to liability based upon this violative price control by reason of the last sentence which was urged by defendant as a holding that

Union could show equities to prevent application of *Simpson I* prior to the date of the *Simpson* decision on April 20, 1964?[1]

(3) Is the resale price fixing during consignment to be exempted by reason of provisions of the McGuire Act, 66 Stat. 631, 15 U.S.C. §45, in so far as California Fair Trade Law is applicable?[2]

(4) Did defendant engage in unlawful resale price control after April 1964?

(5) Were the plaintiffs damaged?

(6) Did any of the plaintiffs release Union from antitrust damages?

(7) Has there been a defect in pleading a partnership claim on behalf of plaintiff Loren G. McNeil?

(8) Does Union have any counterclaims against certain of the plaintiffs?

B. The Final Hearings as to the Class Action

Between the hearings on the defendant's Motion to Dismiss Count II and plaintiffs' Motions to Establish a Class Action, the plaintiff had taken the depositions of the President of Union, Mr. Fred L. Hartley, and the Vice Presi-

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[1]This Court in *Simpson v. Union Oil Co. of Calif.*, 396 U.S. 13 (1969), held that this sentence did not apply to resale price fixing of automotive gasolines on independent dealers by Union.

[2]This defense is urged despite the fact that Union retailed gasoline, sold direct to potential customers of its dealers, fixed prices by price zones so that competitive dealers perhaps a few blocks apart were told to charge differing retail prices. At the *Simpson* trial, defendant abandoned this defense. (See Petition for a Writ of Certiorari, p. 40, *Simpson v. Union Oil of Calif.*, 396 U.S. 13 (1969).)

dent in charge of Marketing, Mr. C. E. Rathbone, (Cr. 629-639, 641-644).

Following the denial of motions to establish a class action in the Central District cases, plaintiffs, on November 3, 1967, filed in the *Weingartner* case a motion for an order establishing that the plaintiffs represent the class of Union Oil dealers in the Northern District of California, Eastern District of California, the States of Washington, Oregon, Montana, Idaho and Nevada who were retail consignee dealers or retail dealers gasoline storage and purchase dealers during the period of time April 20, 1961 to April 20, 1965, and all dealers in the States of California, Washington, Oregon, Montana, Idaho and Nevada for the period April 20, 1961 to July, 1962, or, in the alternative, that the plaintiffs represent all said dealers in the aforesaid six states and Arizona during the period April 20, 1961 to April 20, 1965 (Cr. 489-490). Plaintiffs also sought the basic information from defendant with respect to the determination of damages for the class members (Id.).

On November 17, 1967 plaintiffs filed an amendment to their motion to establish a class action. The amendment requested a trial or a hearing for a further showing of facts pursuant to plaintiffs' motion to establish a class action, in the above-entitled matter as discussed in *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F. 2d 909 (9th Cir. 1964) (Cr. 566-567).

(a) Definitions of the class involved

Following the filing of memoranda by each party and after oral argument, the Court requested the plaintiffs

on March 29, 1968 to file a final definitive definition of the class. This was done in plaintiffs' Statement as to Class Action (Cr. 601-657). This document asserted that the plaintiffs represent the following classes:

(a) Retail Dealer Consignment Agreement Program: Service station dealers who have leased service stations from Union and have operated under a Retail Dealer Consignment Agreement in the States of California, Washington, Oregon, Nevada, Arizona, Montana, Utah and Idaho (Cr. 602).

(b) Retail Dealers Storage and Purchase Agreement Program: Service station dealers who have leased service stations from Union and operated under a Retail Dealer Storage and Purchase Agreement in the States of California, Washington, Oregon, Nevada and Arizona (Cr. 602).

(b) Basis of Class Action

(1) The Showing of Plaintiffs (Cr. 285-286, 491-520, 571-578, 586-600, 601-657, 809-886)

The papers of the plaintiffs in their Motion to Establish a Class Action showed as follows:

(a) *The Retail Dealer Consignment Agreement Program.*

1. The Retail Dealer Consignment Agreement Program was in violation of the Sherman Act. *Simpson v. Union Oil Co. of Calif.*, 377 U.S. 13 (1964). The complaint of the plaintiffs herein is based upon the *Simpson* decision. The Retail Dealer Consignment Agreement Program involved herein is identical to the Retail Dealer Consignment Agreement Program analyzed by the Su-

preme Court in the *Simpson* case with the exceptions that:

(a) Until 1960 Union Oil Company issued only one-year leases and thereafter it issued three-year leases with a one-year probationary period (Cr. 634).

(b) The sliding scales used by Union to determine commissions allowed the retail dealer varied from time to time (377 U.S. 13, n. 7).

2. Each lessee dealer received an identical station lease from Union in the Pacific States area (Cr. 634).

3. Each lessee dealer received the identical Retail Dealer Consignment Agreement from Union Oil Company in the States of California, Arizona, Montana, Utah, Idaho, Oregon, Washington and Nevada (Cr. 634, 337 U.S. 13, n. 1).

4. Under the Retail Dealer Consignment Agreement Program the defendant after April, 1961 required the dealer when ordered to drop his retail prices to lose three mills for every one cent drop in retail price ordered (Cr. 608-656). The dealer had no alternative but to accept the price order, with resulting loss of commission (Cr. 630-636, 640). The means used by Union to control retail prices during consignment may be summarized as follows:

(1) 99% of the lessee dealers and 63% of the non lessee dealers were placed under consignment agreement, which contained a price fixing clause stating:

"2. He will sell Consignor's gasoline at retail tax-included prices from time to time specifically author-

ized by Consignor in writing." (Cr. 511, *Simpson v. Union Oil Co. of Calif.*, 377 U.S. at 15, n. 1.)

(2) Under this agreement, dealers were issued retail price instructions by Union, Id., 377 U.S. at 19-20.

(3) Union established a base or norm retail selling price applicable to all dealers. The only differentiation involved the storage capacity of the station (Cr. 638).

(a) During the period June, 1961 through January 1, 1963, at the base retail selling price established by Union, the dealer received 8¢ commission before rent in the States of California, Oregon, Washington, Arizona and Nevada (Cr. 513; 638-639). During the period January 1, 1963 to August, 1964 at the base retail selling price established by Union, the dealer received 7.4¢ ethyl and 7.1¢ regular before rent (Cr. 640). Union changed commission schedules at will. (Cr. 285, Ex. "B", letters of April 15, 1958).

(4) Union then determined, in its sole discretion, the retail prices to be posted, whether to be below, the same as, or above the base retail selling price. *Simpson v. Union Oil Co. of Calif.*, 377 U.S. at 19. The decision was shown by plaintiffs to be determined by what the "Majors" charge for gasoline (Id., testimony of R. H. Rath; Cr. 285, Ex. "A", letter of April 15, 1958).

5. When a new price was to be changed, all affected dealers were telephoned by Union and told what the new retail price was to be. The dealers were to follow these prices (Cr. 630, testimony of President of Union), and lost thereby three mills for each one cent drop in price.

6. The dealers were accountable to Union Oil Co. for all monies derived from the sale of gasoline based on the retail price as telephoned by defendant (Cr. 285). If a dealer was found to be pricing over the directed retail price, the dealer was billed at a higher price at the next delivery to him. (Letter of R. H. Rath, 4, Ex. "D", Cr. 285; see also R. 70-87, *Simpson v. Union Oil of Calif.* 377 U.S. 13.)

7. Dealers who did not obey price directives would not have their leases renewed. (Stipulation in *Simpson v. Union Oil Co. of Calif.*, 377 U.S. 13 at Cr. 608-640; see also Cr. 573, 646-647; denied at Cr. 804-807.)

(b) *The Retail Dealer Storage and Purchase Agreement Program*

As to the Retail Dealer Storage and Purchase Agreement Program, the papers of the plaintiffs showed as follows:

1. That the same leases of 3 years with a one year probationary clause as to incoming dealers were in effect in the States of California, Oregon, Washington, Arizona and Nevada (Cr. 634).

2. Each lessee dealer received an identical Retail Dealer Storage and Purchase Agreement (Cr. 100-106).

3. Union claimed it allowed the dealer an option to become a purchase and sale dealer or a storage and purchase dealer. In fact, plaintiffs showed that there was no real choice since Union required the dealer under purchase and sale to buy all gasoline in his storage facilities with an immediate cash purchase involving thousands of dollars, whereas storage and purchase dealers were

given initial inventory of gasoline without charge (Cr. 84, 102, 105). In addition, Union made known to the dealers that its marketing department desired the Storage and Purchase Agreement to be signed (Cr. 830). Further, Union informed the dealers that it would not offer price assistance to dealers operating on purchase and sale (Cr. 84). In many cases the dealers were not even told that a choice had been offered between the two types of agreements (Cr. 825-826, 828). Further, the dealer under purchase and sale was subject to the same fluctuations of wholesale price used by Union to control resale prices.

4. The pricing of gasoline under the Storage and Purchase Agreement Program was identical to the method used by Union under the Consignment Agreement (Cr. 101, 107).

Union, it was shown, continued to control retail price judgments by the following actions after April 20, 1964.

1. 83% of the defendant's dealers were placed under Retail Dealer Storage and Purchase. Out of 3,521 service stations operated by dealers, 2,983 were under Storage and Purchase (Cr. 61-62).

2. By reason of this agreement, Union was adjusting the price of its gasoline stored free of charge in the dealer's storage tanks when it desired a retail price change. The dealer was not billed for the initial storage capacity of the gasoline in the tanks (Cr. 514).

3. Union continued its practice of maintaining a base or "adjustment price" (Cr. 520).

(a) The "norm" or adjustment price varied depending on the price community involved (Id.). At

"norm" or "adjustment" price, the dealer's margin was 7.1¢ on regular gasoline before rent (Id.) and 7.4¢ on ethyl before rent (Cr. 91, 101).

(b) Union determined what, in its sole discretion, retail prices should be. The decision was shown to be based on the same factor as involved in consignment, i.e., the so-called "Major" retail price (Cr. 101, 642-644).

4. The dealer was telephoned and told what the new retail price should be (Cr. 644 testimony of C. E. Rathbone, Vice-President of Union; Cr. 838; 842-849; 850; 854-855; 858; 864-865; 872; 874-877. See also defendant's price adjustment forms at Cr. 98, 99, 107). The dealer's wholesale price dropped seven mills for every one cent drop in the telephoned retail price.

5. The dealers who did not charge the adjusted price were subject to harassment. They are told that Union will raise the price to them (Cr. 849); that rent would be increased (Cr. 862-870); that the lease may not be renewed (Cr. 870, 874-876); that it is hard to tell what management will do (Cr. 871-873).

6. Dealers who do not obey Union's pricing policy would suffer lease non-renewal. (*Frank K. Weingartner v. Union Oil Co. of Calif.*, 1966 Trade Cases ¶71,757; Robert Brundage, Cr. 588-593; Testimony of Charles Morley, Cr. 645-656; *Miller v. Union Oil Co.* complaint, C.D. Cal. No. 67-767, Cr. 42.) The record showed that Union's North Coastal Division Sales Manager, Mr. J. J. Grunewald assured an industry member in September, 1967 when Union adjusted its spread between the retail price of regular gasoline and ethyl gasoline from 4¢ a

gallon to 3¢ a gallon "They [the dealers] will either be on a 3¢ spread or they won't be there." (Cr. 649-650, denied at Cr. 804-807.)

(2) The Showing of Defendant

As to the Retail Dealer Consignment Agreement Program, defendant asserted the following (Cr. 523-559):

1. The Retail Dealer Consignment Agreement Program had the blessings of the United States Department of Justice as shown by the provisions of the final consent judgment in the West Coast Oil Case, *United States v. Standard Oil Co. of Calif.*, S.D. Cal. Civil No. 11584-A.

2. That the District Court ruling in *Simpson* following remand established that Union is not liable to any retail dealer consignee because it would be inequitable to hold it so liable.

3. There are no common questions of fact or law because all questions of fact and law have been decided by the Supreme Court's decision in *Simpson*.

4. The injury done to each plaintiff is unique to each.

As to the period after April, 1964, the defendant contends:

1. That each dealer was free to fix his own prices.

2. That a choice was allowed to the dealer whether to become a storage and purchase dealer or to purchase gasoline outright.

3. That each plaintiff does not claim that the Storage and Purchase Agreement is unlawful.

4. Even if so, the Storage and Purchase Agreement involves a lawful agreement as a matter of law.

5. That a claim that the dealer is damaged under the Storage and Purchase Program is nonsense.

6. That the provisions of Rule 23, Federal Rules of Civil Procedure, are inapplicable to the case for the reason that there is no class, that there is no predominating questions of law or fact common to the class, i.e., there are no issues left as far as the Retail Dealer Consignment Program is concerned and that there are no common questions involved in the liability of Union Oil to dealers under the post-consignment agreement program which involves questions unique to each plaintiff as follows:

(1) Did the plaintiff charge the price directed?

(2) During the period plaintiff was allegedly charging prices desired by Union, would he have wanted to charge a different price?

(3) Could he have charged a different price even if he desired, in view of his competitive conditions?

7. There are no common questions involved on the issue of damages which are unique to each plaintiff.

8. That the class action is unnecessary and would make the case unmanageable.

OPINIONS BELOW

Following submissions of the various papers filed pursuant to the Motion of plaintiffs, and after argument of 3/29/68 and 4/19/68, the Court denied plaintiffs' motion to establish a class action, Appendix B (Cr. 887-888). The grounds of the Court's ruling were that plaintiffs had

failed to establish the requisites of paragraphs 2, 3 and 4 of Subdivision (a) of Rule 23, Federal Rules of Civil Procedure, that common questions of law or fact do not predominate over any questions affecting only individual members, and that the class action is not superior to other available methods for the fair and efficient administration of the controversy, as provided for in paragraph (b)(3) of Rule 23. The Court found that the record before it showed that the class action would involve proof of what Union did or said to each dealer and what each dealer did after the statements of Union Oil Company. This was held to be antithesis of a class action. Plaintiffs thereafter sought a certification of the question (Cr. 889-890). Failing to obtain the certification, plaintiffs filed a notice of appeal (Cr. 891).

The Court of Appeals then ruled that it would not review the order denying plaintiffs' motion to establish the class action under Count II of the complaint since the order of denial was not a final order. It ruled that an order denying class action can be reviewed only when the claims of the individual claimants are so small that no attorney could possibly litigate the case inevitably resulting in a dismissal of the entire action. It did not find such a situation here and instead felt that the demand for a judgment in the amount of $353,700.00 was sufficient to insure final review of the class action order.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN CONFLICT WITH THE RULE ANNOUNCED BY THIS COURT IN GILLESPIE v. UNITED STATES STEEL CORP., 379 U.S. 148 (1964), THAT IN DECIDING THE QUESTION OF FINALITY OF A DECISION, THE MOST IMPORTANT COMPETING CONSIDERATIONS ARE "THE INCONVENIENCE AND COST OF PIECEMEAL REVIEW ON THE ONE HAND AND THE DANGER OF DENYING JUSTICE BY DELAY ON THE OTHER."

A. The Decision Below Is A Far Departure From The Established Rule That When It Is Clear That A Group Wrong Has Been Done By A Party In Violation Of Federal Law, A Class Action Will Be Utilized As The Only Practical Method Of Vindicating The Rights Of The Group Victims.

1. There is serious injustice in delaying review of the order denying the establishment of a class action because long delay can be anticipated, and the class, being large, will necessarily lose members by reason of death, bankruptcy, or loss of address. As to these latter members of the group, there is an effective dismissal.

This Court in *Simpson v. Union Oil of Calif.*, 377 U.S. 13 (1964) outlawed Union's method of wholesaling gasoline to thousands of dealers which (1) fixed the independent dealer's retail prices under express reservation in consignment agreements, (2) controlled completely the commission or gross profit made by the independent dealer and which (3) narrowed the dealer's margin where Union ordered retail price drops. These agreements were extracted by means of threatened or actual lease ouster. As of 1957, there were 3,305 price fixing consignment agreements in interstate commerce. This price control, by consignment, was used continuously by Union to at least April, 1964. Union's President, Mr. Fred Hartley, admitted that control of the dealer's price and commissions by it was mandatory as a condition of its doing business with the dealer. (Cr. 629-636). See also testi-

mony of C. E. Rathbone, then Director of Marketing, Union Oil Company. *Hearing before Subcommittee No. 5, Select Committee on Small Business, Operation and Effect of Consent Decree in West Coast Oil Case, House of Representatives*, 87th Cong. 2nd Sess., May 12, 1962, pp. 215-225. Mr. Rathbone testified before the subcommittee that Union's consignment program was mandatory for all lessee-dealers. As noted by a prior report of this committee as to consignment selling, "the selling price and gross margin of profit per gallon in the commission-type stations are wholly within the control of the supplier." Cited in *Simpson v. Union Oil Co.*, 377 U.S. 13, at 19, n. 5.

It is the duty of the federal courts to make available all remedies to those injured by violations of the antitrust laws. Such remedies not only make the injured party whole, but make effective Congressional purpose that powerful corporations do not violate the antitrust laws. *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948). "The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Radovich v. National Football League*, 352 U.S. 445 (1957); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *Fortner Enterprises Inc. v. United States Steel Corp.*, 394 U.S. 495, at 502 (1969):

> "As the special provision awarding treble damages to successful plaintiffs illustrates, Congress has encouraged private antitrust litigation not merely to compensate those who have been directly injured but

also to vindicate the important public interest in free competition."

The power of the judiciary to enforce the Sherman Act implies the power to make effective the right of recovery afforded by the Sherman Act. See *Dolgow v. Anderson* 43 F.R.D. 472, (E.D.N.Y. 1968), citing cases at p. 481. The answer given below by the learned Court is that eventually the rights of victimized dealers may be dealt with. But the order denying the class action below is a final order for the following reasons:

(1) As to at least those dealers who will die in the interim period of review or whose addresses are lost or who have filed bankruptcy, there is a complete loss of protection and rights guaranteed by the Sherman Act. Clearly, as to these persons there is a final ruling.

(2) As to entire class, violation of the antitrust laws to the injury of each has been established by this Court in the *Simpson* litigation. The narrowing of the dealer's commission margin of three tenths of a cent for every one cent drop in price ordered by Union is not contested. There remains only the determination of the dollar amount of that loss of commission as to each member of the class to complete the litigation. A dealer is damaged to the extent of his loss of commissions when an unlawful price control scheme eliminates his ability to control his own price and commissions. *Hanover Shoe Inc. v. United Shoe Machinery Corp.*, supra. Under such circumstances, delay means denial of justice, lack of enforcement of the antitrust laws, continued disregard by major oil companies of the ruling of the court that retail price judgments are to be exercised by the independent

dealer-lessee. (See letter Senator Phillip A. Hart, Michigan, to Federal Trade Commission C.C.H. Trade Reg. Rep. ¶50,286.)

Clearly under these circumstances, the decisions of this Court allowing review of orders which effectively terminate rights or which involve serious public consequences or which would otherwise cause unnecessary delay and create injustice thereby are applicable here and require review of an order denying a class action.

In *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1940), this Court determined that the test of whether an order is "final for appellate review is a practical one rather than technical. This Court said at 152-153:

> ". . . . [I]n deciding the question of finality the most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.'"

See also *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945); *Brown Shoe Inc. v. United States*, 370 U.S. 294, 304-311 (1962); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

Here a ruling which effectively terminates the action as to some and which denies immediate relief to those known to have suffered a wrong can and should be reviewed.

The learned Court below ruled that an order disallowing a class action is reviewable only when the entire action will likely fall by dismissal of the class action. But *Gillespie* does not specify this as the indispensible requirement of appealability. Delay here, as in *Gillespie*, of perhaps a

number of years in having remedies for the class determined will work a great injustice on its members, "since the claims for recovery for their benefit have been effectively cut off so long as the District Judge's ruling stands." (379 U.S. at 153). Here, as in *Gillespie*, the class members' claims may be deemed severable and their denial unquestionably applicable as to them.

Further, because of the importance to the public of antitrust enforcement, because of the large numbers of persons involved in selling gasoline as independent business men who may be outside social legislation protecting employees, because of the power of the corporations who conduct interstate petroleum refining and marketing businesses in the billion dollar range, there are serious public consequences to the denial of the class action pursuant to FED. R. CIV. P. 23 to the victims of a price fixing scheme which has been adjudicated to be unlawful by this Court.

It is respectfully urged that no court since the enactment of revised Federal Rules of Civil Procedure, Rule 23 has denied a class action involving a previously adjudicated violation of the antitrust laws affecting a large group, when the group is asserted to be composed of persons of small means who do not have the ability to litigate with those who possess enormous power. The consignment program was, indeed, akin to a declaration of war by Union upon the independence of the dealer. A Union dealer as example was held at his service station from 4:00 P.M. until 2:00 A.M. by three representatives of Union, until overcome with fatigue, he signed the requested consignment agreement allowing control of his prices. (Cr. 593-599). Class actions have been usually

allowed following the government's proof of violation of the antitrust laws. *City of Chicago v. Allen Bradley Co.*, 32 F.R.D. 448; (N.D. Ill. 1963); *State of Illinois v. Brunswick Corp.*, 32 F.R.D. 453 (N.D. Ill. 1963); *City of Philadelphia v. Morton Salt Co.*, 248 F. Supp. 506 (E.D. Pa. 1965); *New York City Transit Authority v. United States Steel Corp.*, 40 F.R.D. 334 (S.D.N.Y. 1966); *State of Iowa v. Union Asphalt and Road Oils, Inc.*, 281 F. Supp. 391 (S.D. Iowa 1968); *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452 (E.D. Pa. 1968); *Minnesota v. United States Steel Corp.*, 44 F.R.D. 569 (D.C. Minn. 1968); *Illinois v. Harper and Row Pub. Co., et al*, 301 F. Supp. 484 (N.D. Ill. 1969); *In Re Multi District Civil Anti Trust Action Involving Antibiotic Drugs*, 1969 Trade Cases ¶ 72,860. But cf. *City of New York v. International Pipe and Products Corp.*, 410 F. 2d 295 (2nd Cir. 1969); *Utah v. American Pipe and Construction Co. et al*, (C.D. Cal. 1969), 1970 Trade Cases ¶ 73,033. In these two exceptions, motions to establish class actions were denied. But in these cases the plaintiffs were seeking to represent governmental units who were specifically found to have the staying power needed to litigate on an individual basis the issues with the "behemoths" of business. Thus, the ruling of the Ninth Circuit below is believed to be the first court to refuse to review an order denying a class action composed of small struggling businessmen who do not have the means to engage in extensive litigation over antitrust violations with companies of the size and power of Union. A class, indeed, which the Federal Trade Commission has referred to as "economic serfs". *Federal Trade Commission Report on Anticompetitive Practices in the*

Marketing of Gasoline, June 30, 1967, at p. 42, C.C.H. Trade Reg. Rep. ¶ 10,373 (printed in part).

II. THE DETERMINATION OF THE DISTRICT COURT THAT THE RECORD DID NOT SUPPORT THE TWO CLASS ACTIONS INVOLVED IS CLEARLY ERRONEOUS.

A. The Decisive Issues In The Establishment Of A Class Action Is Whether Or Not The Claim Appears Meritorious, And Whether The Injured Parties Who Would Otherwise Be Included In The Class Are Obviously Able And Capable To Take Care Of Their Own Individual Interests Without The Need Of The Class Action Protection.

1. This Court had determined that Retail Dealers Consignees are "small, struggling competitors seeking retail gas customers" who have been victimized by Union in the forced surrender of their right to fix and establish their own retail prices.

It is respectfully submitted that the order of the District Court below is in basic conflict with the purposes of Congress under the antitrust laws and with the purposes of FED. R. CIV. P. 23. The Court, firstly, failed to distinguish the two class actions sought to be enforced: (1) Lessee-Dealers who had their retail prices fixed and their commissions controlled by direct price fixing clauses in consignment agreements and (2) Lessee-Dealers whose independent pricing judgments were controlled by Union under its Retail Dealer Storage and Purchase Agreement Program. In ruling upon the establishment of the class actions, the District Court failed to adopt accepted criteria utilized in the determination of a class action. In *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D. N.Y. 1968), Judge Weinstein addressed himself to the following issues: (1) Has Congress called for the utmost use of federal judicial

power in attempting to curb the evils which are subject matter of the suit? (2) Is the class action a practical method of achieving Congressional objectives? If so, Judge Weinstein stated, there is a duty on the part of the federal courts to utilize the class action to make effective Congressional purposes. The District Court will then work with the attorneys to bring about substantial justice, and the court will assume an active role in the conduct of the litigation. After setting forth these general considerations, Judge Weinstein then addressed himself to the specific requirements of Rule 23. He determined whether there were any practical alternatives to the class action device. He noted the alternatives of joinder, intervention, consolidation, test case and administrative agency enforcement. He stated that if the administrative agency does not provide machinery for restitution of damages suffered it is not an alternative. He stated at 43 F.R.D. 484:

> "These alternative devices presuppose 'a group of economically powerful parties who are obviously able and willing to take care of their own interests individually through individual suits or individual decisions about joinder or intervention.'" (Frankel, Amended Rule 23 From A Judge's Point of View, 32 Antitrust L.J. 295, 298 (1966).)

And at 43 F.R.D. 484-485:

> "The class action is particularly appropriate where those who have allegedly been injured 'are in poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive.' Kalven and Rosenfield, The Contemporary Function of the Class Suit, 8 U.Chi. L.Rev. 684, 686 (1941)"

And at 43 F.R.D. 485:

> "Particularly apt in this case is the Advisory Committee's emphasis on the impracticality of individual suits where the claim of each prospective plaintiff is small."

In further considering the appropriateness of the class action he examined the therapeutic value of the class action in terms of the evils caused by violation, the Congressional effort to defeat such conduct and the use of the class action to act as a deterrent force. These were weighed with the possible abuses which might arise under Rule 23. If the court then concludes that the class action is the superior method of adjudication, then the court should determine the requisite set forth in Rule 23 (b); that the questions of law or fact common to the members of the class predominate over any questions affecting individual members (43 F.R.D. at 488). Should the action meet this requisite, then the court should find a definition of the class and determine the adequacy of representation. This latter inquiry in turn is to be determined by deciding if the interest of unnamed persons are clearly identified with the interests of the representatives and whether the representatives can be expected to put up a real fight. He concluded that adequacy of representation was really a question of getting good lawyers to fight for the class, that large numbers were not necessary to assert the class action, and that attorneys who seek to institute class action are presumed competent and capable. Judge Weinstein then concluded that he would not send out a class action notice until the plaintiffs made a showing, like that of a hearing for a preliminary injunction, of material wrongdoing. 43 F.R.D. at 502.

Clearly, under these considerations, the District Court was in error in its order denying the class action at this time. The heart of Judge Weinstein's concern with the court's establishment of the class action was the showing of substantial merit in the action. Here this Honorable Court had adjudicated the issue of violation and there remains only the determination of the loss of commissions under defendant's sliding scale, which the dealer-lessee had to accept or lose the business.

The other considerations of Judge Weinstein which led to his determination to allow a class action upon proof of material wrongdoing are applicable here. Congress has enacted the private treble damage action to supplement the enforcement of the antitrust laws and is one of the surest weapons for effective enforcement. 43 F.R.D. 484, quoting from *Minnesota Mining and Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965). The claims sought here are too small to pursue by individual litigation. There are 17 service stations involved in this action. The average claim is therefore $6,935.29 per service station, and most dealers have only one service station. Out of 15 plaintiffs, 3 had more than one Union station. The class members are not economically powerful enough to take care of their own interests. See discussions in *F.T.C. v. Atlantic Refinery Co.*, 381 U.S. 357 (1965); *F.T.C. v. Texaco, Inc.*, 393 U.S. 223 (1968); *Shell Oil Co. v. F.T.C.*, 360 F. 2d 470 (8th Cir. 1966). In *Simpson*, Union stated to this Court that Mr. Simpson's earnings averaged in two years of the consignment program $473.43 per month.[3] Brief for Respondent

[3]The monthly earnings of Mr. Simpson appear in Record, R. 322, *Simpson v. Union Oil Co. of Calif.*, 377 U.S. 13 (1964). The

in Opposition to Petition for a Writ of Certiorari, p. 6. *Simpson v. Union Oil Co. of Calif.*, October Term, 1969, 396 U.S. 13 (1964). There Union urged:

> "Thus he lost no earnings by not obtaining a new lease from Union. The going wage scale for employee-managers of company operated service stations was $480 to $500 per month (Tr. 512-513), but Simpson's 'take home' at the Union station had averaged only $473.43 (Pet. App. xxv). Thus the Union station had earned for Simpson nothing more than wages. Both an economist and an accountant testified that, accordingly, there were no net profits and therefore Simpson's business had no value (Tr. 959-960, 981-984, 1021, 1051, 1055)."

Union Oil service station dealers are manifestly not parties with staying power. Yet the corporation who opposes them is the opposite, and it has evidenced that it will exercise all means to maintain control of retail prices.

The Court may recall the words of Union's General Sales Manager, Mr. Rath, to Mr. Simpson in 1958 when Union learned that Mr. Simpson would litigate his ouster, Petition for a Writ of Certiorari, p. 9, *Simpson v. Union Oil Co.* 396 U.S. 13 (1969) in part:

> ". . . Well, what can you do about it, you can't . . . you haven't the money to make trouble and fight the Union Oil Company. Who do you think you are?"

The record further shows (1) The sponsorship of a program to having dealers sign declarations of nonparticipation in this action, Union asserting the role of

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1957 earnings of Union were $38,235,535, its sales of refined products were $347,900,000, its assets were $228,908,600. (Id. R. 211).

advocate and judge (2) The attempted ouster of the lead dealer in the complaint, Mr. Frank Weingartner, *Weingartner v. Union Oil Co. of Calif.*, 1966 Trade Cases ¶71,757 (N.D. Cal. 1965); (3) The retaliation against Robert A. Brundage, an intervenor, in June, 1965 by cancelling his lease because he did not sign the declaration of nonparticipation (Cr. 588-592). In these circumstances, the therapeutic value of the class action, particularly in the field of resale price control over small, struggling competitors is obvious. *Dolgow v. Anderson*, 43 F.R.D. 472.

Clearly, also, the existence of common issues predominates over individual issues. See especially *Siegel v. Chicken Delight, Inc.*, 271 F. Supp. 722 (N.D. Cal. 1967). There then remains only the contention that the small numbers involved here cannot really represent such a large class. But the claims of these plaintiffs are representative and dealer lessees cannot conceivably be antagonistic to their claims since this court has determined the illegality of Union's conduct. Adequacy is simply a question of getting good lawyers to fight the cause by offering them a handsome reward. The class action is a semi-public remedy administered by the lawyer in private practice—a cross between administrative action and private litigation. *Dolgow v. Anderson*, 43 F.R.D., at 481, citing Kalven and Rosenfield. The attorneys representing the plaintiffs here represented Mr. Simpson at the appellate and trial levels. The federal courts have the duty under the circumstances here to declare a class action as to the consignment agreement program of Union, in the words of Rule 23, "As soon as practicable after the commencement of the action brought as a class action."

The basis of the court's ruling below that the predominate issue is what Union said to each dealer ignores the basis of the illegality of the consignment program. The basis for this class is Union's promulgation of identical contracts containing price fixing clauses and the direction of retail prices under them. This was a mandatory program of administered prices. The verbal statements of Union's employees were not needed to enforce these contracts. As to the attempt of defendant to defect the class action by claiming that there was antagonism between the plaintiffs and the dealers who signed declarations that they did not want to participate in the *Weingartner* case, clearly this was an attempt by Union to be the judge of its own cause. The revised Rule 23 prevents doing what Union did to defeat the class. See *Knuth v. Erie-Crawford Dairy Coop. Ass'n*, 395 F. 2d 420 (3d Cir., 1968).

2. The storage and purchase agreement program was a widespread resale price maintenance program propped by the same agreements among all dealers and operating in the same manner among all dealers.

The predominate issue as to defendant's liability to the dealers in its Storage and Purchase Agreement Program is whether Union engaged in resale price control in violation of the Sherman Act. The mechanisms of the program, the methods of determining retail price and wholesale were the same as used in consignment. The only difference between the programs was the inability to use express contractual provisions as a means of such control. There is nothing in *Simpson v. Union Oil Co. of Calif.*, 377 U.S. 13 (1964) or *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960) which require that plain-

tiffs prove the exercise of overt threats against all dealers who disobeyed Union's price orders.

On the contrary, these cases make it clear that a scheme or program which is based on anything more than a simple announcement of a suggested price policy and the refusal to sell the product to a nonconforming dealer is a violative program. Here the defendant issues only three year leases with a one year probationary clause giving it the opportunity to destroy the livelihood of those who ignore price directions; it zones all dealers; it uses a free storage of gasoline; it fluctuates wholesale prices to control retail prices, fixing the retail price in the precise manner Mr. Ratti testified to in Congressional Hearings on consignment, *Simpson v. Union Oil of Calif.*, 377 U.S. 13, at 19, n. 6, and communicates this retail price to the dealer. (Cr. 634-636; 107; 641-644). This is beyond the limited dispensation of *Parke, Davis.*

Overt coercion is not required when the showing is made that agreements in restraint of trade are sought by those with sufficient economic power to restrain an appreciable part of interstate commerce. *F.T.C. v. Texaco, Inc.* 393 U.S. 23 (1968). The conclusion of the District Courts that plaintiffs will be required to show the exercise of overt coercion by Union Oil to prove liability here is incorrect.

Clearly, the District Court erred in placing the oral statements of Union's representatives to the dealers in the enforcement of retail prices under the Storage and Purchase Agreement Program as the predominate issue. As was stated in *Shell Oil Co. v. F.T.C.*, 360 F.2d 470, 478:

> "To its dealers, Atlantic's wish was Atlantic's command".

CONCLUSION

Justice delayed is justice denied. When small struggling dealers have been adjudicated to be the victims of an unlawful price control program which controls their retail prices, fixes their commission and narrows that commission based on unilateral price orders, the class action is the only effective remedy to redress a proven wrong upon thousands of persons of small means.

It is respectfully urged for the foregoing reasons a Writ of Certiorari be granted.

Dated, San Francisco, California,
September 30, 1970.

MAXWELL KEITH,
JAMES J. DURYEA,
Attorneys for Petitioners.

(Appendices Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

FRANK K. WEINGARTNER, ROBERT L. HARPER, SUS SUYEYASU, NEAL HALL, ARMANDO J. ACEVEDO, individually, and representing a class of unnamed plaintiffs, *Appellants,* vs. UNION OIL COMPANY OF CALIFORNIA, *Appellee.*	No. 23,488

[August 3, 1970]

Appeal from the United States District Court
for the Northern District of California

Before: HAMLEY, DUNIWAY and WRIGHT, Circuit Judges,

HAMLEY, Circuit Judge:

Five gasoline service station dealers who sell the products of Union Oil Company of California (Union Oil), brought this antitrust suit against Union Oil on April 20, 1965. Proceeding under 15 U.S.C. §§ 15 and 26, they sought damages for the asserted violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. According to the complaint, the alleged violation consisted of

Union Oil's retail price control of the gasoline sold by plaintiffs.[1]

Ten additional gasoline service station dealers engaged in selling Union Oil products were eventually permitted to intervene for the purpose of asserting similar claims. The original plaintiffs and the ten intervenors will be referred to herein as plaintiffs. During the period in question all of them did business in the Northern District of California, where this action was brought. Their single damage claims against Union Oil aggregate $117,900, but they ask that this amount be trebled to $353,700.

By way of a second claim in the complaint and amended complaints, supplemented by an independent motion, plaintiffs also sought to establish a class action under FED. R. CIV. P. 23. In this connection plaintiffs asserted that they represent a class consisting of all independent Union Oil retail service station operators in seven or eight western states who did business under Union Oil consignment agreements or retail dealer storage and purchase agreements during the four years preceding the filing of the complaint herein. Defendants estimate that a maximum of three thousand dealers would be brought in to the litigation if a class action were permitted. Plaintiffs allege that the single damage claims of these additional dealers would aggregate $34,800,000, trebled to $104,400,000.

The district court denied plaintiffs' motion to declare a class action. In so ruling, the court held that plaintiffs

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[1]Plaintiffs challenge the legality of Union Oil's consignment agreements with retail dealers, which were also involved in *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), clarified in 396 U.S. 13 (1969), and its "Retail Dealer Storage and Purchase Agreements" and "Retail Dealer Gasoline Purchase Contracts," which were utilized after the first *Simpson* decision.

failed to establish the prerequisites of paragraphs (2), (3) and (4) of Rule 23(a), and failed to meet the conditions set forth in Rule 23(b)(3).[2] Plaintiffs requested the district court to certify the case for an interlocutory appeal to this court, pursuant to 28 U.S.C. § 1292(b). The district court refused to certify, whereupon plaintiffs took this appeal, purportedly under 28 U.S.C. § 1291 (final decisions), from the order denying the motion to declare a class action.

Union Oil argues that plaintiffs may not prosecute this appeal because the order in question is not a final decision within the meaning of 28 U.S.C. § 1291.

Perhaps it would be sufficient to cite *Rogers v. Alaska Steamship Co.*, 249 F.2d 646, 649 (9th Cir. 1957), which appears to support Union Oil's contention. However, when that case was decided, amended Rule 23 of the Federal Rules of Civil Procedure, effective July 1, 1966, had not been adopted, and plaintiffs' contentions are based upon that rule. Consequently, we do not think that our decision in *Rogers* is controlling here.

A "final decision" generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. *Catlin v. United States*, 324 U.S. 229, 233 (1945). But in order for a decision to be "final" within the meaning of section 1291, it is not necessary that it be the last order possible to be made in

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[2]In reference to FED. R. CIV. P. 23(b)(3), the district court stated that it was:

> ". . . unable to find that questions of law or fact common to the members of the class . . . 'predominate over any questions affecting only individual members' nor can the court find 'that a class action is superior to other available methods for the fair and efficient administration [adjudication] of the controversy.'"

the case. *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964).[3]

In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), for example, the Supreme Court held final and appealable an order denying a corporation's motion to require the plaintiff in a stockholder's derivative action to give defendant security for reasonable suit expenses. The *Cohen* court held that the order there in question fell within that small class of orders which

> ". . . finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546.

Citing *Gillespie* and *Cohen*, the Second Circuit, in *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119 (2nd Cir. 1966), denied a motion to dismiss an appeal from an order striking a class action claim. The district court had dismissed the class action claim on the ground that it was not maintainable under the Federal Rules, although it had permitted the plaintiff to continue to litigate his individual claim. Pointing out that the plaintiff's personal claim in that "complex and costly" case was for recovery of only seventy dollars and that "no lawyer of competence"

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[3] In *Gillespie*, the Supreme Court also said:

> "[I]t is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality. Because of this difficulty this Court has held that the requirement of finality be given a 'practical rather than a technical construction.' . . . [I]n deciding the question of finality the most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.' 379 U.S. at 152-153.

would pursue such a claim, the Second Circuit observed that dismissal of the class action claim would:

> ". . . for all practical purposes terminate the litigation. Where the effect of a district court's order, if not reviewed, is the death knell of the action, review should be allowed." 370 F.2d at 121.[4]

In resisting Union Oil's contention in the present case that the district court's order denying a class action is not "final" within the meaning of section 1291, plaintiff's rely upon what they see as an analogous order held appealable in *Cohen* and upon the specific holding in *Eisen*.[5] However, in our opinion neither *Cohen* nor *Eisen* (read in the light of subsequent Second Circuit cases) brings the district court order in this case within the scope of section 1291.

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[4]In the *Eisen* opinion the Second Circuit also noted one other problem that might be created by refusing to consider the dismissal of a class action an appealable order:

> "If the appeal is dismissed, not only will Eisen's claims never be adjudicated, but no appellate court will be given the chance to decide if this class action was proper under the newly amended Rule 23." 370 F.2d at 120.

In other words, the unknown members of the class sought to be represented will have no incentive (assuming their claims are likewise small or they have no notice of the action) to appeal the dismissal of the class action even if the original plaintiff or plaintiffs carry their action through to a final judgment.

[5]Plaintiffs also cite *Green v. Wolf Corp.*, 406 F.2d 291, 295 at note 6 (2nd Cir. 1968), which followed *Eisen* and in which it also appeared that if a class action were not allowed the whole lawsuit would come to an end.

But see the comment on *Green* in *Caceres v. International Air Transp. Ass'n*, 422 F.2d 141, 143 (2nd Cir. 1970).

In *Hohmann v. Packard Instrument Co.*, 399 F.2d 711 (7th Cir. 1968), also relied upon by plaintiffs, the appeal was taken under the interlocutory provision of 28 U.S.C. § 1292(b), insofar as the class action feature of the district court order was concerned. As noted above plaintiffs in our case were not permitted to appeal under section 1292(b).

The *Cohen* approach rests upon either of two underpinnings: the "collateral order" rule, *e.g.*, Frank, *Requiem for the Final Judgment Rule*, 45 TEX. L. REV. 292, 300-302 (1966); or the likelihood of "irreparable harm" to a party if immediate review is not allowed, *e.g.*, Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 364 (1961); *see also*, *Forgay v. Conrad*, 47 U.S. 201 (1848). Under neither premise does *Cohen* render the order before us appealable. The district court's dismissal of the class claim did not deal with rights collateral to the merits of the lawsuit. Rather, it struck one of the two counts from the complaint entirely and had the effect of blocking that claim from this lawsuit. Nor will denial of review of that order at this stage create an irreparable hardship for plaintiffs, as we develop more fully in the discussion which follows.

Turning to *Eisen* and its progeny: in *City of New York v. International Pipe & Ceramics Corp.*, 410 F.2d 295 (2nd Cir. 1969), the Second Circuit was asked to review a district court order holding that an antitrust suit brought by twenty-seven governmental agencies could not be treated as a class action. The court held that the described order was not a final order reviewable under 28 U.S.C. § 1291. In so ruling, the Second Circuit restricted its prior decision in *Eisen* to the latter's "death knell" rationale—an order dismissing a class action is appealable only when the dismissal for all practical purposes spells the end of the litigation. In *International Pipe*, by comparison,

> ". . . no such situation exists. The City and twenty-seven plaintiff-intervenors with adequate resources to

continue the action and with substantial amounts at stake will undoubtedly carry on." *Id.*, at 299.

The finality question arose again in the Second Circuit in *Caceres v. International Air Transport Ass'n*, 422 F.2d 141 (2nd Cir. 1970), also an antitrust action. In that case seven travel agents sought to represent not only themselves but also a class of similarly situated travel agents. The district court entered an order determining that their action was not maintainable as a class action. The Second Circuit held that this order was not appealable, once again distinguishing *Eisen* on the grounds articulated in *International Pipe*.[6] Cf. 3B J. MOORE, FEDERAL PRACTICE ¶¶ 23.50 at 23-1105, 23.97 at 23-1951 (2nd ed. 1969).

In our opinion *International Pipe* and *International Air Transport*, rather than *Eisen*, are to be followed in this case. The primary factor which gave finality to the class action orders in *Eisen* and *Green* (see note 5 above) was the effect of that order upon the plaintiff's personal claim. Without the financial support inherent in a class action,

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[6]The Second Circuit stated, in part:
". . . [T]he gloss upon section 1291 for alleged classes under Rule 23(b)(3) should not be expanded beyond the type of situation present in *Eisen* and *Green*. In those two cases, the average claim of each member of the class was quite small. Here it is not; Judge Mansfield pointed out that the average claim alleged is $150,000 per member. [By comparison], the claim by the representative plaintiff in *Eisen* was only $70 and in *Green* was less than $1,000. While the damage claims of the seven plaintiffs here are not yet specific, enough appears in the record to justify Judge Mansfield's conclusion that no claim was of 'such a low order of magnitude that it would be unfeasible or uneconomic for the claimant to seek redress.' 46 F.R.D. at 95. Therefore, we hold that the judge's order was not a final decision under 28 U.S.C. § 1291. Accordingly, the appeal is dismissed." 422 F.2d at 144 (footnote omitted).

plaintiff in *Eisen* could not have proceeded with his seventy dollar personal claim, nor could plaintiff in *Green* have proceeded with his claim of less than one thousand dollars. In our case, on the other hand, the fifteen plaintiffs have, as noted above, a $353,700 stake in the suit. We are not convinced by any representation made to us by plaintiffs that they lack the economic ability to finance their part of this lawsuit.

Plaintiffs also make the contention, accepted in *Eisen*, 370 F.2d at 120, and touched on in note 4 above, that unnamed members of the class they seek to represent will be practically unable to appeal the striking of the class action claim after plaintiffs herein proceed to a final judgment. However, this argument for allowing an appeal of the order now before us seems to have been forsaken by the Second Circuit in *International Air Transport*. Although noting that the argument was "not without force," the court in that case pointed out that its logical end would be that an order refusing class action treatment should almost always be appealable.

> "Such a rule of broad appealability would run contrary to the various policies behind congressional adherence to the final judgment rule . . ." 422 F.2d at 143.

We agree.

The appeal having been taken from a non-appealable order, we conclude that it must be dismissed.

So Ordered.

Appendix B

United States District Court
For the Northern District of California

No. 43514

Frank K. Weingartner, et al.,
Plaintiffs,
vs.
Union Oil Company of California,
Defendant.

ORDER DENYING PLAINTIFF'S MOTION TO DECLARE A CLASS ACTION.

After reviewing the record in the instant case and the numerous affidavits submitted to the court, the court finds not only that plaintiffs have failed to establish the prerequisites of paragraphs (2), (3) and (4) of subdivision (a) of Rule 23 Federal Rules of Civil Procedure, but also that plaintiffs have failed to "additionally" establish and the court is unable to find that questions of law or fact common to the members of the class (or more appropriately the three, six or more classes here possibly involved, depending upon the test applied in making up the separate categories) "predominate over any questions affecting only individual members" nor can the court find "that a class action is superior to other avail-

able methods for the fair and efficient administration of the controversy." (Paragraph (3) of subdivision (b) of said Rule 23.)

On the present record the affidavits on file and the deposition testimony from plaintiffs in the Los Angeles cases demonstrate that as to each of the hundreds of persons whom counsel for plaintiffs would draw into litigation, there would be necessitated a *detailed* inquiry (and possibly for jury determination) of what Union did or said to him and what he did thereafter. This is the antithesis of a class action. On this, the present record, the court finds no basis to declare a class action and the motion therefor must be and is again denied.

Dated: July 30, 1968.

/s/ Alfonso J. Zirpoli,
United States District Judge.

Filed July 31, 1968,
James P. Welsh, Clerk.

Appendix C

United States District Court
For the Northern District of California,
Southern Division

No. 43514

Frank K. Weingartner, et al.,
Plaintiffs,

vs.

Union Oil Company of California,
Defendant.

ORDER

The Court having considered the briefs and having heard the oral arguments of counsel in respect of the various motions now pending for decision,

It Is Hereby Ordered as follows:

1. Plaintiffs' Motion to Compel Further Answers to Plaintiffs' First Interrogatories, filed April 4, 1966, is *Denied*, except that defendant shall furnish to plaintiffs the names and addresses of ten Union Oil dealers (other than persons who have sought to intervene in this action) located in California who declined to sign a declaration of the type signed by other Union Oil dealers and on file herein. Said denial of plaintiffs' motion is without prejudice to renewal thereof upon a proper showing of cause therefor.

2. Plaintiffs' Motion to Strike Declarations of Service Station Dealers Submitted by Defendant Union Oil Company of California, filed March 29, 1966, is *Denied*.

3. The Motion to Intervene as Plaintiff, filed June 21, 1966 on behalf of Herbert Lynn Kelly, and the Motion to Become a Party, filed November 16, 1966 on behalf of Ray M. Miller, are and each of them is *Denied*, without prejudice to such rights said persons might have should the Court subsequently determine that this action may be properly maintained as a class action.

4. The Motions to Become a Party filed November 16, 1965 on behalf of Loren G. McNeil and John T. Boyle, the Motions to Become a Party filed April 5, 1966 on behalf of Fred L. Cooper and Ben M. Goff, the Motion to Become a Party filed June 21, 1966 on behalf of Robert Marsili, and the Motion to Become a Party filed June 23, 1966 on behalf of Charles H. Matsell, are each hereby treated as motions to intervene as plaintiffs; as such, each of said motions is *Granted*, provided that each of said persons shall serve and file a complaint in intervention within 15 days of the date of this Order.

5. No motion to intervene in this action on behalf of any other persons may be filed, and no such motion will be entertained by the Court, unless filed on behalf of a resident of this Judicial District, the Northern District of California, and unless filed within 60 days from Friday, June 24, 1966.

6. The proceedings have not yet reached a point where it is practicable for the Court to determine whether this action is to be maintained as a class action. Accordingly, defendant's motion to strike Count II of plaintiffs' Com-

plaint is *Denied* without prejudice, the Court reserving until a later date the question whether this action may be so maintained.

7. Defendant's motion, filed August 2, 1965, for a separate statement of the claims of the five original plaintiffs, and to sever each from the other, is *Denied* without prejudice to defendant's right hereafter to move for the separation and trial of a particular issue or issues.

8. Defendant's motion, filed August 2, 1965, for a more definite statement of the claim of Neal Hall is *Granted*.

Dated: July 8, 1966.

/s/ Alfonso J. Zirpoli,
United States District Judge

Approved as to form only:
Maxwell Keith,

Attorney for plaintiffs and
proposed intervenors.

Filed July 8, 1966,
James P. Welsh, Clerk.

Appendix D

SHERMAN ANTITRUST ACT

Act of July 2, 1890, Chap. 647, 26 Stat. 209, as amended: 15 U.S. Code, Secs. 1, 2:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between re-

tailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. [July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209; August 17, 1937, Chap. 690, Title VIII, 50 Stat. 693; July 7, 1955, Chap. 281, 69 Stat. 282; 15 U. S. Code, Sec. 1.]

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. [July 2, 1890, Chap. 647, Sec. 2, 26 Stat. 209; July 7, 1955, Chap. 281, 69 Stat. 282; 15 U. S. Code, Sec. 2.]"

CLAYTON ACT

Section 4 of the Clayton Act, October 15, 1914, Chap. 323, § 4, 38 Stat. 731, 15 U.S.C. § 15, provides:

"Sec. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sus-

tained, and the cost of suit, including a reasonable attorney's fee."

RULE 23—RULES OF CIVIL PROCEDURE

CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class,

thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the

class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they

consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.

Appendix C

In the United States District Court
For the Northern District of California
Southern Division

No. 43514

Frank K. Weingartner, Robert L. Harper, Sus Suyeyasu, Neal Hall, Armando J. Acevedo, individually, and representing a class of unnamed plaintiffs,
Plaintiffs,
vs.
Union Oil Company of California,
Defendant.

Amended Complaint for Damages Under the Antitrust Laws

The above-named plaintiffs allege in their own name and as representatives of a class of unnamed plaintiffs as follows:

For a first cause of action:

I
Parties

1. Plaintiffs are or have been lessees and operators of service stations selling Union Oil gasoline products to the public.

2. Since on or about July of 1962, plaintiff Frank K. Weingartner has leased a station from Union Oil Company of California, located at Mission Boulevard and Tarin Road, Alameda County, California. As of the date of the filing of this complaint, he is the lessee and operator of said station.

3. Plaintiff Robert L. Harper has since on or about May, 1963, leased and operated a station from defendant at 915 Whipple Road, Union City, Alameda County, California.

4. Sus Suyeyasu leased a service station from defendant during the period August, 1960, to June, 1962. Said station was located at 167 Foothill Boulevard, San Leandro, California.

5. Neal Hall sues as assignee of a station leased from Union Oil Company of California, located at 26091 Mission Boulevard, Hayward, Alameda County California.

6. Armando J. Acevedo leased a service station from defendant during the period March, 1961, to August, 1962. Said station was located at 1855 Taraval Street, San Francisco, California.

7. Defendant Union Oil Company of California (hereinafter referred to as Union Oil Company) is a corporation organized and existing under the laws of the State of California. It has an office and place of business located at 425 First Street, San Francisco, California.

II

Jurisdiction and Venue

8. The complaint is filed and these proceedings are instituted against the above-named defendant under Sec-

tions 15 and 26 of Title 15 U.S.C.A., being a part of the Act of Congress of July 2, 1890, c. 649, 26 Stat. 209, as amended, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman and Clayton Act. Said Act, 15 U.S.C. 26, gives this Court jurisdiction to grant injunctive relief against threatened loss or damage by violation of the antitrust laws.

III

Interstate Trade and Commerce

9. Defendant Union Oil Company does business in the States of California, Arizona, Oregon, Washington, Montana, Utah, Idaho, Nevada, Alaska and Hawaii. It has assets of approximately nine hundred million dollars. It drills, produces and imports vast quantities of crude oil; said drilling, production and importing taking place in trade and commerce between the several states and in foreign commerce.

10. Defendant Union Oil Company operates oil and petroleum pipelines in the States of California and Montana and Washington. Said defendant owns or operates or leases ships designed to transport its crude oil and products along the seacoast of the West Coast and in foreign commerce.

11. Defendant Union Oil Company operates refineries in the States of California and Montana which refine oil into gasoline and other petroleum products. Defendant Union Oil Company operates at least four refineries in the United States; one at Wilmington, California; one at Cut Bank, Montana; one at Seattle, Washington; and one at Oleum, California.

12. Defendant Union Oil Company is a wholesale distributor of petroleum products. It owns or operates approximately 502 bulk plant stations located throughout the eight western states above named. A substantial amount of sales are made by Union Oil Company out of said bulk plants to wholesalers, retailers and to its own retail outlets; said customers being located in the eight western states, above.

13. Defendant Union Oil Company owns, operates or leases a vast number of gasoline transports in the eight western states, above, which pick up petroleum products at transport terminals and deliver the petroleum products of Union Oil Company to large storage retail outlets.

14. In addition to the aforesaid activities of defendant Union Oil Company in the production, refining and delivery of oil and petroleum products, said defendant is also a large retailer of petroleum products in the eight western states. It has directly owned approximately 52 retail stations in the eight western states.

15. Defendant Union Oil Company has obtained and exercises effective control over the operations of approximately 4,000 service stations in the eight western states, which sell its refined petroleum products to consumers. These retail outlets have been operated by independent businessmen who have purchased refined petroleum products from said defendant for resale to the consumers. Most of these service stations are leased or subleased by Union Oil Company to independent operators. All of these operators have entered into supply contracts with the said defendant. By means of various provisions in these leases, subleases, and supply contracts, and by means of a sys-

tem of policing which subjects the business operations of these independent service station operators to minute inspection and surveillance, the said defendant completely dominates and controls the manner in which these independent businessmen operate their retail outlets. The defendant Union Oil Company requires the independent operators who sell its refined petroleum products to purchase their requirements exclusively from defendant; and not to handle or sell the petroleum products of others. Defendant Union Oil Company controls the price at which these independent operators resell gasoline and other petroleum products. Defendant Union Oil Company directly controls millions of dollars of petroleum sales in the eight western states.

16. The practices hereinafter alleged as in violation of the antitrust laws directly affect said retail activities in the eight western states.

17. As of 1962, the total volume of business of Union Oil Company was $526,751,000.00 and it marketed over 60,000,000 barrels of petroleum products which were in or affected interstate and foreign trade and commerce.

IV

Offenses Charged

18. Beginning on or about May, 1955, and continuing thereafter up to and including the date of the filing of this complaint, the defendant Union Oil Company has and now is engaged in the effectuating of contracts which restrain unreasonably, and pursuant to said contracts has in fact unreasonably restrained interstate trade and commerce, and has attempted to and intended to monopolize

the sale of gasoline in violation of Sections 1 and 2 of the Act of Congress of July 2, 1890, commonly known as the Sherman Act. Defendant threatens to continue and will continue the violation of said sections unless the relief hereinafter prayed for in this complaint is granted.

19. The aforesaid contracts attempt to monopoline and the actual monopolization has resulted and does result from entering into leases or subleases with thousands of otherwise independent service station operators which condition that said independent businessmen obtain all their petroleum products from the defendant Union Oil Company and to charge the public prices for gasoline as fixed by said defendant.

20. Prior to May, 1955, the defendant Union Oil Company did not attempt to directly fix the prices of refined gasoline by its lessees by means of an express written document. Said retail price fixing was done indirectly by employees or agents of said defendant who constantly watched the pricing policies of thousands of independent lessees or sublessees of said defendant and who carried out a program of having said independent businessmen abide by the prices fixed by the Union Oil Company.

21. Starting on or about May, 1955, the defendant Union Oil Company created a contract known as the "Retail Dealer Consignment Agreement." This consignment contract was forced by said defendant on independent service station lessees who otherwise were responsible to themselves for the operation of said service stations. Said agreement, however, directly fixed the retail prices that these thousands of otherwise independent service station operators could charge on the resale of

gasoline at the prices set by the Union Oil Company. Existing independent lessees were forced to sign said consignment agreements on fear of losing their leases, and new independent lessees were unable to obtain leases from defendant Union Oil Company without submitting to signing the new "Retail Dealer Consignment Agreement."

22. Since approximately April, 1964, until about September, 1964, the defendant has continued to wholesale gasoline pursuant to the aforesaid Retail Dealer Consignment Agreement, and has continued to control the dealer's retail prices by utilizing economic coercion, as herein alleged, as a means of controlling retail prices.

23. Since about September, 1964, defendant has controlled the dealers' retail prices under a so-called Retail Dealer Storage and Purchase Agreement. Under this Agreement, the wholesale price to the dealer varies according to the fluctuations in retail price established by Union Oil Company. The wholesale price is manipulated by defendant so as to control the dealer's retail prices. The retail dealer's margins are based on the consignment scale in effect under the Retail Dealer Consignment Agreement.

24. Independent dealers are required to follow Union Oil price orders on fear of lease cancellation.

25. The aforesaid contract and plans of the defendant had and has the following effects on interstate trade and commerce:

(a) It prevents the putative independent service station operators from establishing their own retail gasoline prices in the eight western states.

(b) It prevents the consuming public from obtaining the benefits of price competition among putative competitive independent retail operators who sell the defendant's gasoline for resale.

(c) It prevents price competition between putative independent retailers of gasoline in competition with the competitors of Union Oil Company.

(d) It replaces the independence of approximately four thousand petroleum retailers by the forced acceptance of a "consignee" relationship as to gasoline alone.

(e) The consignment contract is enforced by scare tactics and coercive devices which seriously interfere with the happiness and liberty of otherwise independent businessmen.

IV

Injury and Damage

26. As a condition of obtaining leases to defendant's stations, defendant Union Oil Company required the plaintiffs to sign the said Retail Dealer Consignment Agreement and to submit to retail price control.

27. At all times herein, defendant has utilized said consignment agreement and its other retail price control plans as aforesaid in violation of the antitrust laws to fix and control the service station operators' retail prices. As a direct result of such price control, plaintiffs were required to absorb a loss of their commission margin of approximately .003 for every cent drop in the retail price of Union gasolines.

28. Union Oil Company has at most times herein fixed the retail price of gasoline at retail levels below what it has called "normal" retail price, and as a direct result thereby and a necessary effect of Union Oil's retail consignment dealer program and unlawful price control plans, the plaintiffs herein have been compelled to sell Union's gasoline at depressed prices, and this, in turn, has required the plaintiffs to absorb at least, but most of the time more than, 3/10¢ per gallon of gasoline sold.

29. All of the period of time herein, the defendant has coerced plaintiffs into absorbing such loss of margins or profits in the sale of gasoline of defendant.

30. By reason of the aforesaid violation of the antitrust laws, plaintiffs were unable to fix the price of their gasoline and were coerced into losing their margins of profit on the sale of gasoline to their injury and damage in the following approximate amounts:

Frank K. Weingartner	:	$7,000.00
Robert L. Harper	:	$7,000.00
Sus Suyeyasu	:	$4,000.00
Neal Hall	:	$3,000.00
Armando J. Acevedo	:	$1,000.00

For a second cause of action:

1. Plaintiffs reallege each and every allegation contained in paragraphs 1 to and including 30 of their first cause of action as though fully set forth herein.

2. Defendant has issued and caused to be signed identical dealer leases and consignment contracts with lessee dealers in the State of California, as have been issued to plaintiffs.

3. Pursuant to said contracts and the unlawful price control program of defendant as aforesaid, each lessee dealer has been required to account to defendant approximately three tenths of a cent for every drop of 1¢ in the price of gasoline below what the defendant determined to be "normal" retail price.

4. Plaintiffs allege that they bring this action not only for themselves, but as representatives of a class under the provisions of Section 23 of the Federal Rules of Civil Procedure. The class which plaintiffs herein represent is composed of all of the service station dealers under consignment agreement with defendant from four years preceding the filing of this complaint.

5. The said operators are so numerous that it would be impracticable to bring them all before the Court.

6. All of the service station operators thus represented have been members of a class against whom the coercive practices and price fixing control herein alleged were directed, and it was one of the objects of the aforesaid program to control retail price and coercive scheme adopted by the defendant to coerce the service station operators to account to the company for a drop in retail prices and require them to absorb a loss of their margin or profits for the benefit of the defendant when the said defendant determined to cause a drop in retail prices, and thus cause the lessee dealer to make a kickback to the defendant. This effect, which the defendant intended to bring about, was in fact accomplished as a result of the violations of the antitrust laws herein alleged.

7. The defendant did all the things to this class which has been alleged to have been done against the plaintiffs in the first claim herein set forth.

8. There are common questions of law and fact affecting the rights of all the lessee dealers who purchased and sold petroleum products from defendant. Among those common questions are the price fixing program and plan and coerced conspiracy to fix and control retail prices causing a loss of dealer margin and absorption of a portion of the drop in retail prices by the defendant, the use of coercive weapons of short term leases, lease cancellation and a vast number of employees to enforce pric control orders; the specific manner and nature of defendant's price control scheme is asserted to be applied uniformly on all service station dealers in the class.

9. The service station dealers who are herein represented were damaged as a direct result of the violations of the antitrust laws herein alleged. They were damaged in that they were coerced into kicking back to the defendant approximately .003¢ for every cent drop in retail prices. Such kickbacks or reduction in margins would not have prevailed had not defendant attempted to fix and control retail prices of independent resellers in violation of the antitrust laws.

10. Union Oil Company has sold approximately 560,000,000 gallons of gasoline in the State of California in each of the years for the period 1958 to the present, and damage to the class is thus estimated to be $8,700,000.00 for each year, or a sum of $34,800,000.00.

Wherefore, plaintiffs pray judgment as follows:

1. That summons issue to the defendant commanding it to answer the allegations contained in this complaint, and to abide by and perform such orders and decrees as the Court may make in the premises.

2. That the plaintiffs herein receive the following sums from the defendant Union Oil Company and said sums be trebled, and that the Court award a reasonable attorney's fee all in accordance with Section 4 of the Clayton Act (15 U.S.C.A. 15) in such cases made and provided:

Frank K. Weingartner	:	$7,000.00
Robert L. Harper	:	$7,000.00
Sus Suyeyasu	:	$4,000.00
Neal Hall	:	$3,000.00
Armando J. Acevedo	:	$1,000.00

3. That the service station dealers who are herein represented receive upon an accounting for their claims a sum equal to 3/10ths of a cent on each one cent drop in the retail price of gasoline per gallon of gasoline sold by them under the Retail Dealer Consignment Agreement and Retail Dealer Storage and Purchase Agreement of Union Oil Company, and that this sum be trebled, and that the Court award reasonable attorney's fees, all in accordance with Section 4 of the Clayton Act (15 U.S.C.A. 15) in such cases made and provided.

4. That the plaintiffs recover their costs herein.

5. That plaintiffs have such other and further relief as the Court may deem proper.

Dated: April 18, 1966.

/s/ Maxwell Keith,
Attorney for Plaintiffs.

Filed April 20, 1966,
James P. Welsh, Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 800

FRANK K. WEINGARTNER, ET AL.,
Petitioners,

vs.

UNION OIL COMPANY OF CALIFORNIA,
Respondent.

Brief for Respondent in Opposition to Petition for Writ of Certiorari

MOSES LASKY
Brobeck, Phleger & Harrison
111 Sutter Street
San Francisco, California 94104
Telephone: 434-0900
Attorney for Respondent

RICHARD HAAS
111 Sutter Street
San Francisco, California 94104
Of Counsel

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 800

FRANK K. WEINGARTNER, ET AL.,
Petitioners,

vs.

UNION OIL COMPANY OF CALIFORNIA,
Respondent.

Brief for Respondent in Opposition to Petition for Writ of Certiorari

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A) is not yet reported in F.2d but appears in 1970 Trade Cases ¶ 73, 291. The District Court's opinion is not reported but is in Appendix B to the petition and is quoted in full at p. 5 infra.

JURISDICTION

The District Court had jurisdiction under 15 U.S.C. § 15. The Court of Appeals had no jurisdiction and for that reason dismissed the appeal, because the appeal was from an interlocutory order and the District Court had refused to certify the case for an interlocutory appeal under 28 U.S.C. § 1292(b). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Petitioners sued to assert claims under Sections 1 and 2 of the Sherman Act and Section 4 of the Clayton Act, all adequately quoted in Pet. App. D. They sought to maintain the suit as a class action under F.R.Civ. Proc. Rule 23, also quoted in Pet. App. D.

The relevant portion of Rule 23, for present purposes, is sub. (c)(1):

> "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

The petition fails to quote statutes governing this appeal:

28 U.S.C. 1291

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

28 U.S.C. 1292(b)

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such an order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order: *Provided, how-*

All emphasis in quotations has been added unless otherwise noted. References to the record are indicated by the symbol "R.", references to the Petition by the symbol "Pet."

ever, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

QUESTION PRESENTED

Only one question was decided by the Court of Appeals:

Is an interlocutory order, declining to determine that "on this, the present record" an action may proceed under F.R.Civ. Proc. Rule 23 as a class action, appealable as a "final decision" under 28 U.S.C. § 1291, where the action is yet to be tried? Is it not merely an interlocutory order not appealable in the absence of a certification under 28 U.S.C. § 1292(b)?

The other "questions" stated in the petition (pp. 2, 4) are not present at all, as they relate to the issue whether the District Court's order was erroneous. That issue was never reached by the court below.

STATEMENT OF THE CASE

Most of the Statement of the petition consists of assertions about the merits of the substantive claims, although the case has not yet been tried, or of assertions relative to the propriety of a class action, although the facts were found to the contrary in the District Court and that determination was not reviewed by the court below. None of that is relevant to the only question presently involved.

A. The Proceedings Concerning a Class Action.

This action was commenced by five of the fifteen petitioners (R. 1) before new Rule 23 of the Rules of Civil Procedure was adopted in 1966. Under old Rule 23 the practice was for a plaintiff to assert his claim in one count and repeat it as a class action in another; a motion to strike the second count was the means of challenging the class aspect. That practice was followed here (R. 8, 14). While Union's motion to strike was pending,

Rule 23 was amended and thereafter the District Court denied Union's motion on the ground that (R. 359-360):

> "Proceedings have not yet reached a point where it is practicable for the Court to determine whether this action is to be maintained as a class action * * * the Court reserving until a later date the question whether this action may be so maintained."

In the interim, and also later, a number of persons moved to intervene (R. 40-56, 131-198, 296-302) and ten were granted leave to do so (R. 359), bringing the number of plaintiffs to fifteen.

Some 70 others, some of whom had been denied intervention, and still others who had not sought to intervene, all represented by petitioners' counsel, thereafter filed similar complaints in the Central District of California (Pet. 9). Still later, petitioners' counsel moved in those cases under Rule 23 to declare them maintainable as class actions (R. 657-833). Those motions were denied by the court in the Central District (R. 659).

The same counsel then filed their motion in this case for an order declaring affirmatively that it could be maintained as a class action (R. 489). At the hearing the District Court requested specific statements as to contentions and issues and a factual showing to enable it to reach a determination (Rep. Tr. of March 29, 1968, p. 48).* After all the parties had responded to this request

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*In doing so the court acted on the wise basis later articulated by the Second Circuit thus, in *City of New York v. International Pipe & Ceramics Corp.*, 410 F.2d 295, 298 (2 Cir. 1969):

> "The key words of Rule 23 are 'fair and efficient adjudication.' This issue should not be decided in an abstract or academic manner but rather in a practical and realistic way by a trial judge who has knowledge of the actual problems presented in the courtroom by these multi-plaintiff, multi-defendant cases. In theory and in an initial off-hand reaction, it is tempting to say: why not let everyone who asserts a somewhat related grievance come into a common arena to resolve their controversy? However, on a moment's reflection, it should be apparent that the capacities of judges and jurors to absorb the factual situations thus presented are finite and that courthouses are not coliseums."

(R. 658-808, 809-886), the court entered the following order (R. 887):

> "After reviewing the record in the instant case and the numerous affidavits submitted to the court, the court finds not only that plaintiffs have failed to establish the prerequisites of paragraphs (2), (3) and (4) of subdivision (a) of Rule 23 Federal Rules of Civil Procedure, but also that plaintiffs have failed to 'additionally' establish and the court is unable to find that questions of law or fact common to the members of the class (or more appropriately the three, six or more classes here possibly involved, depending upon the test applied in making up the separate categories) 'predominate over any questions affecting only individual members' nor can the court find 'that a class action is superior to other available methods for the fair and efficient administration of the controversy.' (Paragraph (3) of subdivision (b) of said Rule 23.)
>
> "On the present record the affidavits on file and the deposition testimony from plaintiffs in the Los Angeles cases demonstrate that as to each of the hundreds of persons whom counsel for plaintiffs would draw into litigation, there would be necessitated a *detailed* [emphasis in original] inquiry (and possibly for jury determination) of what Union did or said to him and what he did thereafter. This is the antithesis of a class action. *On this, the present record,* the court finds no basis to declare a class action and the motion therefor must be and is again denied."

Petitioners' counsel then requested a certification under 28 U.S.C. § 1292(b) to permit an interlocutory appeal from this order. Certification was denied, but counsel appealed anyway (Pet. 20). That appeal was dismissed by the court below on the ground that the order was not appealable. (Pet.App.A, p. viii). It is to review that dismissal of the appeal that petitioners now seek review by this Court.

B. The Nature of the Case and Its Background.

Inasmuch as the only question presentable to this Court is the same as on an interlocutory appeal in any case from an order

under Rule 23, the particular facts of this case are of small, if any, relevance. We review them just enough to dispel the erroneous picture of the petition.

Plaintiffs are or were service station dealers. The substantive claims asserted relate to two entirely different economic relationships utilized by Union in different periods for the marketing of gasoline. The first was a system of marketing which Union used, until April 1964, involving consignment of gasoline to its dealers. On April 20, 1964 this Court decided *Simpson v. Union Oil Co. of California,* 377 U.S. 13. On April 27, 1964, as soon as Union could obtain and digest that decision, it advised each of its dealers of what this Court had held and informed him that he was "therefore free to set the price at which you sell gasoline to the motoring public . . . ." (R. 802). Union then offered to its dealers a choice of two types of purchase and sales agreement, and all chose one or the other.

As respects the pre-April 1964 period, although petitioners' claims rest on an assumption that the consignment system was the same as that used at a still earlier period of time and involved in *Simpson,* the kind of damages claimed is different. In *Simpson* the principal claim was based on Union's refusal to continue to lease its premises to the dealer or to deal with him. No plaintiff makes that claim here; the claim is simply that each plaintiff would have made more in the sale of gasoline but for the provision of the consignment agreement respecting his sales price. That involves the predicate that the dealer observed Union's price directions; the case as to each plaintiff is controlled by the fact, individual to him, whether he paid any attention to Union's price direction or, instead, charged what he wanted when he wanted.

The claims as respects post-April 1964 differ from those pertaining to the prior time in that they rest on no unlawful agreement. Counsel so conceded in an early application in this case, as

was made clear in an opinion by the District Court reported in *Weingartner v. Union Oil Company,* 1966 Trade Cas. ¶ 71,757, at pp. 82500-01;

> "The record now is clear to the effect that plaintiff does not allege or claim that either the Retail Dealer Purchase and Storage Agreement or the Retail Dealer Purchase Contract in use by defendant since the ruling in *Simpson* are in themselves unlawful."

The claim relative to post-April 1964 is that, despite the lawfulness of his supply agreement, each plaintiff was *coerced* to adhere to resale prices. Thus the case of each dealer rests on its facts, individual to him, for any dealer's claim of being "ordered", "threatened", or "coerced" and the like must necessarily be proved by different conversations between different claimants and different members of what the complaint styles "a vast army of [Union] employees" (R. 344).

Before ruling on plaintiffs' motion to declare that the action could be maintained as a class action, the District Court called on counsel to make a factual showing of the existence of some predominant common issue. The record then made shows that there was none. Depositions had been taken of the some 70 Union Oil dealer-plaintiffs in the similar Central District cases, and about 74 pages of their testimony were introduced here by Union (R. 658-732). They demonstrated to the satisfaction of the District Court that the situation of each dealer was individual and different from that of every other. Many of these dealers testified that they had *no grievance whatever* with Union conceivably related to the allegations in their complaints.* Many testified that they had charged whatever retail prices their own business judgment dictated in the consignment period and in the

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**E.g.,* Jacobus (R. 662-63, 664); McDonald (R. 666, 667); Bilbrey (R. 676-77); Anondson (R. 670, 671); Golden (R. 689); Parker (R. 707); Bowen (R. 710).

post-consignment period,* and that there was no pressure from Union to charge any price.**

ARGUMENT

An order under F.R.Civ.P. Rule 23 determining that an action may be not maintained as a class action is always without prejudice to renewal during the progress of the case. Rule 23(c)(1) expressly provides that such an order "may be altered or amended before the decision on the merits." The Notes of the Advisory Committee on Rule 23(c)(1) state (28 U.S.C.A. Rules 17-33, 1970 Pocket Part, p. 82):

> "A determination once made can be altered or amended before decision on the merits if, upon fuller development of the facts, the original determination appears unsound."

Before the District Court could determine that the action could be maintained as a class action, the record before it would have to support findings of fact that the four "prerequisites to a class action" expressed in Rule 23(a) existed and that the "additional" tests necessary under Rule 23(b) were also present. The order appealed from specifically stated that "on this, the *present* record, the court finds no basis to declare a class action" (p. 5, supra). Counsel are free to make another record, if they can, or the court can change its mind on the present record.

Plainly, then, the District Court's order was interlocutory and not final within the meaning of 28 U.S.C. § 1291.

**E.g.*, Reisner (R. 690, 691-92, 693-94), Deach (R. 698), Jacobus (R. 661-62, R. 663-64), McDonald (R. 666), Bilbrey (R. 675-76), Anondson (R. 669), Curtis (R. 680-681, 683), LeMaster (R. 685-86), Deach (R. 695-96, 698), Jepsen (R. 700-701), Parker (R. 704-05, 705-06), Bowen (R. 709), Neal (R. 711-13), Drevlo (R. 715-16, 717), Watch (R. 719), Munsee (R. 723), Powell (R. 725-26, 727-28), Aljian (R. 731).

***E.g.*, LeMaster (R. 685-86), Bilbrey (R. 675-76), Curtis (R. 681-82), Deach (R. 695-96, 697), Jacobus (R. 661), McDonald (R. 666), Anondson (R. 669), Reisner (R. 690-91), Jepsen (R. 700-01), Parker (R. 704, 707-08), Bowen (R. 709-10), Drevlo (R. 715-16), Watch (R. 718-19), Munsee (R. 723, 724-25), Powell (R. 725-26).

On this question the Circuits are in accord. The Second Circuit accords with the court below that an order during the course of the case determining that an action may not be maintained as a class action is not appealable. *City of New York v. International Pipe & Ceramics Corp.*, 410 F.2d 295 (2 Cir. 1969); *Caceres v. International Air Transport Ass'n.*, 422 F.2d 141 (2 Cir. 1970) (both antitrust cases).

In the Seventh Circuit an appeal from an order under new Rule 23 adverse to a class action has been permitted only as an interlocutory appeal where taken under the interlocutory appeal procedure of 28 U.S.C. § 1292(b). *Hohmann v. Packard Instrument Co.*, 399 F.2d 711 (7 Cir. 1968). Plaintiffs unsuccessfully tried to utilize that procedure in the present case, but certification under § 1292(b) was denied by the District Court.

The question of appealability of an order adverse to class action under new Rule 23, as a "final" order under § 1291, has not arisen in other circuits. But under former Rule 23 it was uniformly held that an order striking the averments of a class action but permitting the action to continue as to the named plaintiffs is not appealable. E.g., *All American Airways v. Eldred*, 209 F.2d 247, 249 (2 Cir. 1954); *Lipsett v. United States*, 359 F.2d 956 (2 Cir. 1966); *Jumps v. Leverone*, 150 F.2d 876 (7 Cir. 1945); *Rogers v. Alaska S.S. Co.*, 249 F.2d 646, 650 (9 Cir. 1957).* The amendment to Rule 23 could not have altered this principle, for to do so would expand the jurisdiction granted to the Courts of Appeals by 28 U.S.C. § 1291, contrary to Rule 82. In *Snyder v. Harris*, 394 U.S. 332 (1969), this Court held that new Rule 23 could not enlarge jurisdiction and therefore did not permit aggregation of the claims of class members in determining

Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909 (9 Cir. 1964) and *Knuth v. Erie-Crawford Dairy Co-op Ass'n.*, 395 F.2d 420 (3 Cir. 1968), cited by petitioners, are not contrary. In both the District Court dismissed not merely the class action count but the whole case so that the appeal was by the named plaintiffs from a final order dismissing their suits in entirety.

diversity jurisdiction. These principles about non-enlargement of jurisdiction necessarily apply as much to jurisdiction of the appellate courts as to jurisdiction of the district courts.

An order denying maintenance as a class action is analogous to orders denying permissive intervention or consolidation, neither of which is appealable. *Brotherhood of Railroad Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 529 (1947); *Nolfi v. Chrysler Corp.*, 324 F.2d 373 (3 Cir. 1963).

In an effort to escape the interlocutory nature of the order appealed from, counsel postulates the existence of service station dealers who will die or become bankrupt or whose addresses will, inexplicably, be "lost", and asserts, as to these postulated persons, that the order appealed has terminated their claims (Pet. 23, 24). This argument founders in fact and in law, for several reasons.

The first obvious truth is that deaths or bankruptcies do not terminate antitrust claims, for the claims pass to personal representatives of the deceased or to the trustee in bankruptcy. *Hicks v. Bekins Moving & Storage Co.*, 87 F.2d 583 (9 Cir. 1937); *Moore v. Backus*, 78 F.2d 571 (7 Cir. 1935); *Fazakerly v. E. Kahn's Sons Co.*, 75 F.2d 110, 114 (5 Cir. 1935).

In the second place, the persons whose claims are postulated as existing and terminated are not those here appealing. Nothing is more elementary than the principle that only a person aggrieved by an order may appeal from it. *Parr v. United States*, 351 U.S. 513, 516 (1956); *Tileston v. Ullman*, 318 U.S. 44 (1943); *Davis v. Preston*, 280 U.S. 406 (1930); *Lewis v. United States*, 216 U.S. 611 (1910).* The order here appealed from does not adjudicate any claim which any of the petitioners asserts on his own

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*To the same effect: *United States v. Adamant Co.*, 197 F.2d 1, 5 (9 Cir. 1952), cert.den. *sub nom. Bullen v. Scoville*, 344 U.S. 903 (1952); *Webb v. Beverly Hills Federal Savings & Loan Association*, 364 F.2d 146, 149 (9 Cir. 1966); *United States v. Shelley*, 218 F.2d 157, 158 (2 Cir. 1954); *Milgram v. Loew's, Inc.*, 192 F.2d 579, 586 (3 Cir. 1951), cert. den. 343 U.S. 929; *Tri-State Corporation v. Alabama*, 370 F.2d 544, 545 (5 Cir. 1967); *Fuqua v. Bidwell*, 281 F.2d 753, 754 (6 Cir. 1960).

behalf. Their claims to recover under the Clayton Act still remain pending below, awaiting trial and adjudication. It is not the petitioners who are aggrieved by an order that alleged claims of others are not to be involved in this action. No plaintiff would have had standing to appeal from an order denying leave to a non-party to intervene as a plaintiff in the case. Indeed the order appealed from did not even prevent the supposed unnamed members of the class from bringing their own actions and thus left them in the same position they would have been in if they had unsuccessfully moved to intervene. Yet it is settled that an order denying permissive intervention is not appealable, even by the party seeking to intervene. *Brotherhood of Railroad Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 524 (1947):

> "The permissive nature of such intervention necessarily implies that, if intervention is denied, the applicant is not legally bound or prejudiced by any judgment that might be entered in the case. He is at liberty to assert and protect his interests in some more appropriate proceeding. Having no adverse effect upon the applicant, the order denying intervention accordingly falls below the level of appealability."

In simple truth, although the motion to declare a class action was purportedly made by the plaintiffs, their names were conscripted for the purpose as they are now conscripted as petitioners; none of them has any real interest in it; the real parties in interest on whose behalf the motion was made and the appeal taken are petitioners' counsel.

The necessity that the parties appealing be aggrieved in order to appeal is illustrated by two other Second Circuit cases in which, for unusual circumstances, a class action order was held appealable, *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119 (2 Cir. 1966), cert. den. 386 U.S. 1035, and *Green v. Wolf Corp.*, 406 F.2d 291 (2 Cir. 1968). In the later cases of *City of New York v. International Pipe & Ceramics Corp.* 410 F.2d 295 (2 Cir. 1969) and *Caceres v. International Air Transport Assn.*, 422 F.2d 141 (2 Cir.

1970), these two cases were distinguished as turning on the exceptional factual situation that in both there was but one named plaintiff whose own claim was so small ($70.00 in *Eisen*) that no competent attorney would prosecute a claim for so little. Therefore the determination adverse to a class action was the "death knell" of the named plainiff's own case and was tantamount to a dismissal of *his* claim. Here the facts are widely different; the 15 named plaintiffs assert claims in excess of $117,900 before trebling, or $353,700. Petitioners do not even assert that the "death knell" theory is applicable, and the court below was "not convinced by any representation made to [it] by plaintiffs that they lack the economic ability to finance their part of this lawsuit" (Pet. App. A., p. viii). Antitrust litigation is often prosecuted by service station dealers acting on their own behalf and without the benefit of class actions.*

In the third place, there is no basis to assume that anybody who has a grievance has failed to present it. Within the first year counsel sought intervention for some 49 other persons, and they either did intervene or filed suits in Los Angeles. Counsel later filed still other cases in the Central District of California for other persons to an aggregate of another 34. Plainly, Union's dealers were canvassed to join the litigation and all those who wished to assert claims did so by suing. The effort to maintain a class action

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*As noted, five other cases identical to the present are proceeding in Los Angeles. Other examples of such litigation are *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9 Cir. 1964), cert. den. 377 U.S. 993; *Simpson v. Union Oil Company*, 377 U.S. 13 (1964); 396 U.S. 13 (1969); *Standard Oil Co. v. Moore*, 251 F.2d 188 (9 Cir. 1957), cert. den. 356 U.S. 975; *Quinn v. Mobil Oil Co.*, 375 F.2d 273 (1 Cir. 1967), cert. dismissed 389 U.S. 801; *Guidry v. Continental Oil Co.*, 350 F.2d 342 (5 Cir. 1965); *Osborne v. Sinclair Refining Co.*, 286 F.2d 832 (4 Cir. 1960), cert. den. 366 U.S. 963; *Alexander v. Texas Co.*, 165 F.Supp. 53 (W.D. La. 1958); *Brenner v. Texas Co.*, 140 F.Supp. 240 (N.D. Cal. 1956); *Myers v. Shell Oil Co.*, 96 F.Supp. 670 (S.D. Cal. 1951); *Spencer v. Sun Oil Co.*, 94 F.Supp. 408 (D. Conn. 1950); *Broussard v. Socony Mobil Oil Co.*, 350 F.2d 346 (5 Cir. 1965); *Munson v. Richfield Oil Corp.*, 91 F.Supp. 171 (S.D. Cal. 1950).

was an effort to embroil still others in litigation in which they had no desire to participate.

The non-appealable nature of the order is demonstrable by another consideration. If the so-called members of the class had been named plaintiffs and if the order had adjudicated that they had no rights on the merits, leaving the claims of the 15 petitioners unadjudicated, as they are unadjudicated here, the order would not be appealable, because a final judgment as to fewer than all claims or parties can be entered "only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment" R.C.P. 54(b). As otherwise the order "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties" (Rule 54(b)), it is not appealable. *Partin v. Hassan Motors, Inc.*, 363 F.2d 104 (6 Cir. 1966).

Counsel's reliance on *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964) is unfounded. There the District Court made an order adjudicating that there could be no recovery by an administratrix for the benefit of a brother and sisters of a decedent for whose death the administratrix was suing. The order appealed from "effectively cut off" the claims and thus gave "ample reason to view their claims as severable in deciding the issue of finality, particularly since the brother and sisters were separate parties in the petition [to the Court of Appeals] for extraordinary relief." 379 U.S. at 153. Here, the trial court has made no adjudication about the merits of anybody's claim, and no dealer unnamed as a plaintiff appealed to the court below for any relief for which it has petitioned this Court.

It is no great feat to imagine inconveniences, as counsel does, consequent on holding interlocutory orders unappealable. As stated in *Borden Company v. Sylk*, 410 F.2d 843, 846 (3 Cir. 1969):

> "Every interlocutory order involves, to some degree, a potential loss. That risk, however, must be balanced against

> the need for efficient federal judicial administration as evidenced by the Congressional prohibition of piecemeal litigation. To accept the appellant's view is to invite the inundation of appellate dockets with what have heretofore been regarded as nonappealable matters * * * [and], is also ready to invite a geometrical increase in the already unacceptable delay between the date of filing and trial in the metropolitan district courts."

By enacting the interlocutory appeal procedure of 28 U.S.C. § 1292(b), Congress gave as much weight to the arguments in favor of interlocutory appeals as it concluded they deserved. By § 1292(b) it limited the power of the Courts of Appeals to entertain interlocutory appeals. The present order is not included.

CONCLUSION

In *Goldstein v. Cox,* 396 U.S. 471, 478 (1970), this Court said:

> "* * * In the absence of clear and explicit authorization by Congress, piecemeal appellate review is not favored, [cit. omitted] and this Court above all others must limit its review of interlocutory orders."

It is respectfully submitted that there is no shred of merit in the petition. It should be denied.

Dated: San Francisco, California, October 29th, 1970.

MOSES LASKY
Attorney for Respondent

RICHARD HAAS
Of Counsel